



August 17, 2006

Mr. Douglas Slitor  
Project Coordinator  
LIOWP  
Minerals Management Service  
MS 5412, 1201  
Elmwood Park Blvd.,  
New Orleans, LA 70123

RE: Comments on the EIS for Long Island Offshore Wind Park (LIOWP) project and Freedom of Information Act (FOIA) request.

Dear Mr. Slitor:

On June 19, 2006 the Minerals Management Service (MMS) published a Notice of Intent (NOI) to prepare a Draft Environmental Impact Statement (DEIS) for the Long Island Offshore Wind Park (LIOWP) project and a request for written comments regarding the scope of the DEIS. For the Oceans Public Trust Initiative (OPTI), a project of the Earth Island Institute's International Marine Mammal Project, I hereby submit the following comments in response. Our comments reflect OPTI's mission to ensure that the public trust interest in ocean and coastal areas is fully protected by state and federal governments and will focus on the following key issues: 1) Premature nature of the DEIS; 2) Improper role of the applicant; 3) Purpose and need statement; 4) Alternatives analysis; 5) Cumulative Impact; 6) Public trust doctrine; 7) Ocean Wildlife and Marine Habitat Concerns. I am also writing to request documents as detailed below, pursuant to FOIA, 5 U.S.C. §522 *et seq.* and Department of the Interior FOIA regulations, 43 C.F.R. Part 2.

#### **1. Premature Review:**

OPTI is a strong proponent of properly sited renewable energy projects, and we have consistently advocated that the federal government undertake a comprehensive evaluation of offshore renewable resources before considering individual proposals. Such a review will ensure that the optimal location for such projects will be identified so that development can proceed in an environmentally-sound, properly-sited manner that ensures the protection of the public trust resources which such projects will rely upon. Consistent with this understanding, OPTI objects to the premature processing of the LIOWP Application.

Proceeding with the review of the LIOWP project prior to the completion of the programmatic regulations will result in an inadequate and ad hoc review at best. A thorough evaluation and proper public participation are not possible without a prior understanding of the review standards and regulations which will apply. At the outset of these comments we feel it is important to note that the DEIS should be placed on hold until the programmatic regulatory program for alternative energy development on the Outer Continental Shelf (OCS) is complete.

Furthermore, the National Academy of Sciences (NAS) is currently conducting a study of the environmental impacts of wind power. The study is scheduled to be complete in December of this year. The study clearly has the potential to significantly inform MMS and the public on the impacts of the LIOWP project. Knowing that the NAS study is forthcoming and is directly relevant to the environmental evaluation of this project, MMS should wait to evaluate the study and to allow the public an opportunity to address the study before assessing alternatives under the DEIS.

## **2. Improper Role of the Applicant:**

It is important that MMS guard against allowing the applicant to have undue influence over the review process. The National Environmental Policy Act (NEPA) calls for an objective and independent project assessment. The applicant should not be permitted to unduly influence the process including: the scope of the project review; the selection of government contractors; and the pool of data relied on by MMS. MMS must ensure that the purpose and need statement of the DEIS is not dictated by the applicant and that it does not steer the review in favor of the proposed project in its wording or scope. The applicant should in no way be allowed to influence the selection of government contractors. Third party contractors responsible for any review assessment or project studies should be selected through an open and independent process. Also, in regards to scientific information, MMS must rely on independent data and peer reviewed research to inform decisions and not improperly rely on applicant data.

Pursuant to FOIA and Department of Interior FOIA regulations, OPTI requests the MMS provide documents regarding the selection of any third party contractor involved with the LIOWP proposal. Specifically, we seek information regarding which contractor will be preparing the EIS for the LIOWP proposal. We also request all documents and information related to the process for selecting the contractor; and any documents and information regarding the applicant's role in the selection process. For purposes of this request, the term "document" should be construed in its broadest sense to include letters, memoranda, facsimiles and facsimile

cover sheets, telephone message logs, e-mail messages, calendar entries, tapes, meeting notes, etc. Please be sure also to include any documents, letters, emails, or conversation notes between MMS and other agencies concerning these matters.

In the event that any requested documents are not disclosable in their entirety, we request that you release any material that can be reasonably segregated. We also ask that you state with specificity the legal and factual grounds for withholding any documents or portions of documents, including a reasonably detailed description of the document to be withheld. OPTI is willing to pay all reasonable costs incurred in responding to this request. Pursuant to 43 C.F.R. § 2.12, OPTI anticipates your response within 20 days after the receipt of this request.

### **3. Purpose and Need Statement:**

The Purpose and Need Statement used to direct the evaluation of both the project and project alternatives should be broad. It should be based on a regional approach and should look to opportunities beyond New York. The statement must not limit the alternatives analysis to assessing different sites for an offshore wind project. The Purpose and Need statement should call for the evaluation of multiple sources of alternative energy both onshore and offshore. The statement should emphasize the need to find alternatives which ensure the protection of environmental resources and at a bare minimum “do no harm.”

The Federal Register notice states, “(t)he purpose of this project is to provide a utility-scale renewable energy facility providing power to the New York electrical grid.” This statement is not sufficiently broad. There is no reason to limit the review to projects that produce electricity for the New York grid. This is an arbitrary geographic limitation that may serve the applicant’s economic goals but improperly narrows the review and precludes a wide range of projects. Also, MMS must not arbitrarily limit the definition of “utility-scale” to preclude projects which, while contributing to the grid, produce less electricity than the proposed project. OPTI believes it is insufficient to refer generally to “utility scale.” This term needs to be defined and it should cover projects smaller in size than the proposed project.

### **4. Alternatives Analysis:**

The NOI outlines the alternatives in terms of offshore wind projects only. It presents different site options and the possibility of phasing projects. It does not explicitly include the very viable alternatives of meeting energy demands and environmental objects through different types of alternative energy such as onshore wind, biomass fuels, tidal or wave energy etc. This is inadequate.

The alternatives analysis, driven by the Purpose and Need statement, should look at two separate concepts. It first should determine whether the proposed project should be permitted at all in relation to other types of projects that could provide the same benefit with fewer or no negative impacts. Only after that assessment is made should the alternatives analysis proceed to assess where the best location or what the optimal phasing alternative would be for the project.

In terms of alternatives to include in its assessment, the DEIS should look at onshore wind alternatives, deepwater sites, non-wind alternatives both onshore and offshore. There are numerous wind energy project sites, for example, in upstate New York. It should assess the impacts of plant upgrades and conservation measures on future energy supplies. The DEIS should also consider the alternative of simply deferring action on this nearshore location until the very near future, deepwater sites become available through improved technology. As stewards of the OCS, MMS has an obligation to ensure that the public gets optimal use from those lands. As such, MMS must first gauge whether a wind project is the optimal way to address energy needs, or in other words, whether it is in the best interests of the public at all. If a project is not in the best interests of the public then it will not be worth the opportunity costs nor the environmental, economic, and social costs associated with developing the current proposed project. The DEIS must incorporate this type of alternatives analysis before moving to an assessment of site-location or project-size options.

If such an assessment determines that an offshore wind energy facility is an optimal method of meeting energy demands, then it should broadly review alternative siting locations. There is, for example, no valid basis upon which the LIOWP project area should not be considered an alternative for Cape Wind in nearby Nantucket Sound, and for the project sites identified by Winergy and other companies offshore of New Jersey. OPTI takes no position at this time regarding whether any of those sites are appropriate or what their relative merits are. It is clear that by artificially segregating these areas, MMS has segmented NEPA review and created a system that simply defers to the locational preferences of project applicants. This approach violates NEPA, constitutes bad environmental and energy policy, and is contrary to public trust interest. It is not MMS's role to ensure that the most profitable site is developed first. As stewards, it is MMS's role to ensure that the OCS is developed in an environmentally sound way. Wildlife and Marine Habitat considerations must weigh heavily in the site alternatives analysis.

### **5. Cumulative Impact:**

MMS's stewardship role requires optimal management of the entire OCS resource. Individual project impacts which may seem minor in isolation can actually have significant resource implications when considered in the context of other projects. MMS, therefore, cannot assess any project in a vacuum. Rather, the DEIS must review project effects in the context of all other existing, proposed and potential projects. Siting decisions, and project approval generally, should be consistent with a regional understanding and mitigation of the cumulative impacts of OCS projects. This cumulative impacts assessment must include the proposed development of Cape Wind and other wind projects anticipated for the North East Mid Atlantic area. It must be broader than just an assessment of other wind projects, however. LIOWP should be reviewed in conjunction with other alternative energy projects such as LNG, wind, tidal, and aquaculture development, submarine cable and pipeline installations, as well as dredging activities, commercial and recreational fishing activities. Only then will MMS be able to minimize environmental harm to, and maximize public benefit from, the entire OCS.

### **6. Public Trust Doctrine:**

The public trust doctrine provides that the government has an affirmative duty to protect public lands and waters on behalf of the public's benefit. MMS is impressed with a duty to protect the waters and lands of the OCS for the benefit of the American people. This trust applies to activities surrounding navigable waters such as commercial fishing and recreation; it also applies to protecting ecological integrity, water quality, wildlife and aesthetics. The DEIS must encompass all of MMS's responsibilities under the public trust doctrine and must only consider options which will not violate the agency's public trust duties. Unless MMS can ensure that the LIOWP project will not harm marine resources; aesthetics; recreational activities and other public interests in violation of the public trust doctrine, MMS will be required to deny LIOWP authorization to build the proposed project.

### **7. Ocean Wildlife and Marine Habitat Concerns:**

Marine mammals and ocean wildlife are greatly affected by development of the OCS. If environmental concerns are not adequately addressed across the OCS it is these species that will be most directly impacted.

The LIOWP project specifically has the potential to impact sensitive and protected marine wildlife including: several species of endangered sea turtles such as the leatherback, loggerhead, green and Kemp's ridley and their critical habitat; whale species such as, North Atlantic right, humpback, fin and minke whale; and three species of endangered birds, piping plover, roseate tern, and seabeach amaranth.

The DEIS must ensure full compliance with all applicable federal environmental laws which affect these and other marine life, including but not limited to the Endangered Species Act, the Migratory Bird Treaty Act, and the Marine Mammal Protection Act. As part of that effort, for example, the DEIS must evaluate the acoustic impacts of construction on ocean habitat and wildlife. OPTI incorporates by reference a July 6, 2006 report titled: *Effects of Offshore wind farm noise on marine mammals and fish* by Thomsen, Ludemann, Kafemann and Piper<sup>1</sup>. The report concludes that the study, “provided further evidence that wind farm related noise has the potential to affect the physiology and behavior of harbour porpoises and harbour seals at considerable distances.” According to the report, hearing loss is a concern within 1.8km of turbine construction for porpoises and within 400 m for seals. Sound pressure and its impact on animals dissipates over distance but the report found that significant noise can be heard by marine animals more than 80km away from the construction. The report also found that in fish, “physical effects, like internal or external injuries or deafness up to cases of mortality, may happen in the close vicinity to [construction].” Significantly, the report also clearly states the need for further study. The conclusion starts with an explanation that “more precise information on turbine emissions (sound pressure and particle motion), *in situ* measurements of attenuation and on the hearing capabilities of different species are needed to provide a more detailed assessment in the future.”

The report provides the most recent data regarding the impacts of offshore wind projects on marine life to date and should inform the DEIS. It was, however, based on findings from the construction and operation of 1.5MW turbines off the coast of Germany. To understand threshold levels in different animals and to assess the impact that larger, 3.6MW, turbines will have on marine life off the U.S. coast, the issue must be studied further. The DEIS must require a thorough assessment of these issues before a full review can be completed.

In addition to acoustics, MMS must consider the threat that wind turbines pose as fish attracting devices, or FADs. The FAD phenomenon is significant because as turbines attract fish they will have a lure effect on other marine species increasing the number of individual animals impacted by a given structure. The artificial concentration of fish at the base of the turbines is also likely to impact the hunting behavior of other marine species.

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<sup>1</sup> As of July 16, 2006, the report available at:  
<http://www.offshorewindfarms.co.uk/Downloads/BIOLAREport06072006FINAL.pdf>

The threats to marine life posed by the LIOWP Project will involve the injury or killing of individual animals, the alteration of habitat and the interference with the natural behaviors such as prey hunting and migration of marine life. In the case of protected species, such impacts constitute a “taking” in violation of environmental law. The DEIS must address this issue. It must require that the LIOWP project be denied authorization unless MMS can ensure that the project will not result in the illegal taking of protected marine species.

More broadly, the DEIS must require scientifically rigorous studies, and not just applicant data, regarding project impacts on migratory and local bird populations; fish; marine mammals; sea turtles and other protected wildlife. OPTI is pleased to see that the NOI states that impacts producing factors such as noise and vibration are expected to be considered during the construction, operation, and decommissioning phases of the proposed project. This 3-phased assessment is particularly important in regards to assessing impacts on marine life.

MMS has made a public commitment to its role as steward and regulator of the OCS. The DEIS must reflect that commitment and must ensure the safety of the marine habitat and ocean wildlife.

## **Conclusion**

Proceeding with a DEIS is premature in the absence of a programmatic regulatory program and prior to the completion of important and directly relevant studies as outlined above. OPTI must therefore reiterate its objection to the timing of this review and call on MMS to wait for the development of the programmatic regulations before proceeding further.

However, when MMS does move forward with the LIOWP DEIS, it is exceedingly important that MMS: ensures that the applicant is not permitted to have undue influence over the project review and that the DEIS: has a broad purpose and need statement; broadly assesses project alternatives; assesses cumulative impacts; upholds MMS’s responsibilities under the public trust doctrine; and ensures the protection of marine habitat and ocean wildlife pursuant to federal environmental law and MMS’s own commitment to stewardship and regulation.

OPTI appreciates this opportunity to comment on the proposed DEIS and please contact me with any questions. Also, note that my contact information has changed to the following: Oceans Public Trust Initiative,

139 William St. #1, Portland, ME 04103. You can reach me at (207) 774-2925.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cindy Lowry". The signature is fluid and extends to the right with a long, sweeping tail.

Cindy Lowry  
Director